



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 151 OF 2017 (O.S)

VIJAY RANCHHOD MORARJI MORJARIA.....APPLICANT

VERSUS

JULIUS KAGOIYA KUBAL.....RESPONDENT

JUDGMENT

By an Originating Summons application dated 7th November 2017, the applicant sought for the determination of the following questions:

- 1. That the applicant be declared to become entitled by adverse possession of over 12 years to all of that parcel of land registered under the Land Act No. 6 of 2012, the Land Registration Act, No. 5 of 2012 and the Registered Land Act Cap. 300 (repealed) and comprised in the title No. KIINE/SAGANA/444.**
- 2. That there be a declaration that the respondent holds L.R. KIINE/SAGANA/444 in trust for the applicant.**
- 3. That the said applicant be registered as the sole proprietor of all the said parcel of all the said parcel of land namely KIINE/SAGANA/444.**
- 4. That the Land Registrar Kirinyaga do register the applicant as proprietor of L.R. KIINE/SAGANA/444.**
- 5. That the respondent be ordered to pay the costs of this suit to the applicant.**
- 6. That such further orders be made as may be just and expedient.**

The said summons is supported by the applicant's affidavit sworn the same date. The summons is further supported by numerous annexures marked **VRMM 1 – 8**. The summons is also supported by a supplementary affidavit sworn by the applicant on 5th January 2018. The said supplementary affidavit is also supported by two annexures marked **VRMM 9** and **10** respectively. Though the Originating Summons were effected upon the respondent by substituted service as ordered by this Honourable Court on 13/6/2018, the respondent did not Enter Appearance or file defence. The case was directed to proceed Ex-parte after it was satisfied that the respondent was duly served.

APPLICANT'S/PLAINTIFF'S CASE

The plaintiff/applicant contends that on 14/7/1997, they entered into an agreement for sale of L.R. KIINE/SAGANA/444 whereby he was the purchaser while the defendant/respondent was the seller. In the said sale agreement, the consideration was Ksh. 1,000,000/=. It was a term of the said agreement that the plaintiff/applicant was to pay a deposit of Ksh. 900,000/= on 14/9/1997 and the balance of Ksh. 100,000/= was to be paid upon successful transfer of the property to the plaintiff/applicant. It was a further term of the said agreement that the defendant/respondent would immediately after execution of the agreement seek and obtain consent to transfer the land to the plaintiff/applicant and that the plaintiff/applicant would take vacant possession of the land upon payment of the full purchase price.

On 14/7/1997, the plaintiff/applicant paid the down payment of Ksh. 900,000/= and the respondent/defendant gave him the original title deed in respect of the suit property L.R. No. KIINE/SAGANA/444 which is still in custody of the plaintiff/applicant. The plaintiff/applicant contends that the defendant also gave him a copy of his National Identity Card No. 35xxxxx and PIN Certificate No. A00xxxxxxxV. The plaintiff stated that on 6th February 1998, he paid the respondent/defendant the balance of the purchase price which the respondent duly acknowledged. The defendant/respondent then gave the plaintiff vacant possession of the suit property L.R. KIINE/SAGANA/444 on 6/2/1998 and that he has been in continuous, quiet and un-interrupted possession of the said land to-date. The plaintiff/applicant also stated that the defendant/respondent failed and/or refused to apply for and acquire Land Control Board consent as provided for under the terms and conditions of the sale agreement. He pursued the respondent to transfer the property to him to no avail and finally lost all contact with the

respondent. The plaintiff/applicant stated that he recently discovered that on 26th March 2010, the respondent fraudulently and unlawfully caused Gazette Notice 2972 to be published indicating that he had lost his original title deed in respect of L.R. KIINE/SAGANA/444. He immediately lodged a caution and wrote a letter dated 1st November 2017 to the Land Registrar informing him that he was in possession of the original title deed after he bought the land from the respondent who also surrendered the original title to him. The applicant further stated that he has been advised by his advocate which advise he verily believes to be true that upon paying the full consideration and being given vacant possession of L.R. No. KIINE/SAGANA/444, he became the beneficial owner of the same and that a trust was duly created and that the respondent merely holds the land in trust for him.

DEFENDANT'S RESPONDENT'S CASE

The respondent did not Enter Appearance or file defence. The case therefore proceeded Ex-parte.

ANALYSIS AND DECISION

I have considered the evidence by the plaintiff/applicant on oath which is un-controverted. I have also considered the documents produced in evidence by the plaintiff. The acts done by the applicant on the suit land as demonstrated by the photographs produced in Court are clearly adverse to the owner's title. The occupation and use of the suit land by the applicant had animus possidendi; and was nec vi nec clam, nec precario.

In the case of *Peter Mbiru Michuki Vs Samuel Mugo Michuki (2014) e K.L.R*, Hon. Justice Visram, Koome and Odek while allowing the claim for adverse possession held as follows:

“Our reading of the record shows that the plaintiff entered the suit property pursuant to a sale agreement in 1964 as a bona fide purchaser for value. The entry in 1964 was with permission of the appellant qua vendor. In the case of Public Trustee Vs Wanduru, (1984) K.L.R, 314 at 319 Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run. By 1971, the appellant had not transferred the suit property to the respondent. In 1978 if any, permission or licence to enter the suit property had been given by the appellant, the same was terminated by the letter dated 18th August 1978 from Karuga Wandai & Co. Advocates. From 18th August 1978, onwards, the continued occupation and possession of the suit property for a period exceeding 12 years was proved to the required standard when the Originating Summons was filed on 7th February 1991”.

I agree with the decision of the learned Judges of the Superior Court which is binding on me. In the instant case, the plaintiff/applicant paid the respondent the full purchase price and was given vacant possession of the suit property on 6th February 1998. A purchaser in possession of the purchased land after paying the purchase price is a person in whose favour the period of limitation can run. The period of limitation therefore started to run from the said 6th February 1998 and on 5th February 2010, the defendant had lost ownership to the suit property by dint of **Section 38 of the Limitation of Actions Act Cap. 22 Laws of Kenya**. The defendant/respondent willingly and voluntarily entered into an agreement for the sale of his land L.R. No. KIINE/SAGANA/444 at a consideration of Kenya Shillings one million. The applicant/plaintiff performed his part of the bargain and paid the purchase price in full. The plaintiff/applicant was also given vacant possession and he has been in open, notorious, continuous and un-interrupted occupation for a period exceeding 12 years.

In conclusion, I wish to refer to the decision in the case of **Sammy Likunyi Adieme Vs Charles Shamwati Shisikani C.A. No. 3 of 2014 (Kisumu)** (un-reported) where it was held:

“Before we conclude this judgment, we venture to state that even if the respondent had not invoked the Limitation of Actions Act, he would have succeeded on the basis of Constructive trust. In the case of Macharia Mwangi Maina & 87 others Vs Davidson Mwangi Kagiri (2014) e K.L.R, we held that the appellants who were purchasers of portions of the suit land and had been put in possession of the said portions by the respondent, were protected by Section 30 (g) of the Registered Land Act. The act of the respondent, we held had created an overriding interest in favour of the appellants in relation to those portions of land”.

I agree with the decision by the Superior Court and apply to this case mutatis madandis. In the final result, I enter judgment for the plaintiff/applicant against the defendant/respondent as follows:

- 1. A declaration be and is hereby made that the applicant VIJAY RANHHOD MORARJI MORJARIA has acquired land parcel No. KIINE/SAGANA/444 by adverse possession.**
- 2. That the Registrar Kirinyaga do register the applicant VIJAY RANHHOD MORARJI MORJARIA as proprietor of all the said parcel of land namely KIINE/SAGANA/444.**
- 3. The Land Register be rectified by cancelling the land title in the name of the defendant/respondent JULIUS KAGOIYA KUBAI in respect of land parcel No. KIINE/SAGANA/444 and replacing with that of the applicant VIJAY RANHHOD MORARJI MORJARIA.**
- 4. There shall be no order as to costs.**

READ, DELIVERED and SIGNED in open Court at Kerugoya this 22nd day of November, 2019.

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E.C. CHERONO

ELC JUDGE

22ND NOVEMBER, 2019

In the presence of:

1. Mr. Abubakar for Plaintiff – present
2. Mbogo – Court clerk – present